

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case no: CA&R 93/2023

In the matter between:

SICELO SIJILA

APPELLANT

and

STATE

RESPONDENT

JUDGMENT

Zilwa AJ

[1] The Appellant comes to this court on appeal against the two sentences of Rape. He was sentenced to life imprisonment in respect of the first count whilst he was sentenced to 10 years' imprisonment in respect of the second count. He has relied on his automatic right to appeal.

[2] The Appellant was legally represented in the court *a quo*. Afore the trial commenced the terms of the legislatively prescribed minimum sentences and the consequences thereof were explained to the accused.

[3] The Appellant's heads of argument, paragraph 30 thereof, suggest the setting aside of both conviction and sentence. The grounds of appeal only addressed sentence and nothing has been said in attacking the conviction. In any event this court finds no fault on conviction and for that reason I will deal with that issue no further.

[4] In respect of Count 1, it was alleged that on 4 July 2009, in Adelaide in the Eastern Cape, the Appellant did unlawfully and intentionally commit an act of sexual penetration with one N[...] G[...], an 18 year old female, without her consent, whereas in respect of Count 2, it was alleged that on 25 April 2009, near Adelaide in the Eastern Cape, the Appellant did unlawfully and intentionally commit an act of sexual penetration with an adult female, one B[...] M[...], without her consent.

[5] The appeal against sentence is premised on the fact that the record in the court *a quo* went missing and it had to be reconstructed. The only record that could be retrieved was only up to the argument stage prior to sentencing. The record in respect of sentencing which comprises of aggravation and mitigation could not be located. During sentencing the court *a quo* had the following to say:

"SENTENCE

COURT: So due to the fact that the court was unable to obtain statements from the prosecutor and Mr Mavuso, and there is no record of it, the court will go on what the court has."

[6] The Court further placed on record the following:

“... So the court was approached to reconstruct the record regarding the judgment and the sentence. The court has tried it’s best to reconstruct the judgment and the sentence and further the court was unable to contact the prosecutor, Mr Page, or the legal representative, Mr Mavuso to assist with the addresses that they have done, so the court has done its best and is *now going to record the judgment as per the reconstruction.*”

[7] This matter, which comprises of an incomplete record is now serving before us, as an appeal court, and an expectation is that justice should be dispensed to both parties. The first question that should be asked is whether it will be possible for this court to discharge its duty based on an incomplete record. The second question would be whether it will be in the interest of justice to proceed to hear the appeal and make a determination based on an incomplete record nonetheless.

[8] The Appellant is crying foul and lamenting that the magistrate’s decision to unilaterally reconstruct the record without the assistance of other role-players has resulted in the missing of crucial information. This information includes Appellant’s personal circumstances and his level of education etc. It does not even appear whether the Appellant had children to support and whether he was a primary caregiver. His family background does not appear on the record.

[9] It should be emphasized that the process of reconstruction of the record should be a collaborative effort that should be undertaken scrupulously and meticulously by all parties involved.¹

[10] Our courts have been faced with appeals and reviews where the records have been incomplete or lost and some guidance needs to be given as to how to deal with such situations.

¹ See: *S v Nkute* 2021 JDR 2307 (GP); [2021] ZAGPPHC 574; 2022 (1) SACR 436 (GP)

[11] Inasmuch as this judgment is dealing with an appeal, the approach finds full application even on criminal reviews.

The approach to lost and incomplete records

[12] In *S v Nkhahle*², Daffue AJP (with Loubser J concurring), succinctly dealt with the issue of incomplete records on appeal, wherein he made the following remarks regarding the duties of the stenographer:

“[15] What is most disturbing is the fact that the stenographer — also known as the DCRS or CRT clerk — did not do his/her most basic duties: either to switch on the machine and to test the machine and all the microphones before the start of proceedings, or to listen back to the recordings from time to time, i.e. during tea time, lunch time or immediately after the day’s proceedings. If that was the case, he/she would have picked up early on the very first day of the proceedings — 1 September 2017 — that nothing was recorded. Then the matter would still be fresh in the minds of everybody and their notes intact. A reconstruction would have been easy to do. The same applies to the second trial date, to wit 8 September 2017. The excuse that no server was installed in Ventersburg where the trial was conducted is just too lame to accept. I would have thought that back-ups are made on a daily basis by making use of memory sticks or CD’s.”

[13] The Learned Judge proceeded to restate the duty of a presiding officer to keep a record of proceedings and he succinctly did so by stating the following:

² *S v Nkhahle* 2021 (1) SACR 336 (FB); [2020] ZAFSHC 246 Also see: *S v Lamola* 2013 JDR 1676; [2023] ZAGPJHC 668 (GNP); *S v Paledi* 2006 JDR 1044 (T); [2016] ZAFSHC 128

“[17] . . .

[17.1] There is a duty on a presiding officer to keep a record of the proceedings. I agree with Thulare AJ, [as he then was] commenting as follows:

‘The court clerk is the recorder of the court proceedings, the clerk of the court is the custodian of court records and the trial magistrate is the constructor of court records through presiding over court proceedings. On the general consideration of all the factors herein discussed, I find myself unable to find that the duty to reconstruct a record lies with the clerk of the court. In my view, the duty to reconstruct lies with the trial magistrate.’

[17.2] The Judge President of this division warned presiding officers in a PEEC meeting of 27 March 2019 as follows:

‘The Chairperson indicated that he has a list of Magistrates who allow incomplete and unchecked records to be submitted to the High Court. A Magistrate whose name appears on that list will not be allowed to act in the High Court as a Judge, and such information will be made use of when such a person applies to be appointed as a Judge. He urged Mr Mathews to inform the Regional Court Magistrates about this.’

[17.3] I was provided with an extract of the file in petition No 10/2018, RC 04/2016, where Judge President Musi requested a reconstruction of the court record. The same prosecutor was involved, and his written explanation read about word for word the same as in this case. The same regional magistrate as in casu had the following to say:

‘The notes I have for cases that have been finalised in RCP Welkom are in a state of disarray; How that has happened is unbeknown to me.

I therefore will not be able to reconstruct any of those cases because of the possibility of relevant evidence missing or important parts of same being mixed up with other cases. I have tried to put them together but still believe that it is far too risky to reconstruct the entire proceedings as is required in this matter.

The only comment I allow myself to make in this regard is that it would be a travesty of justice if more and more convicted criminals are allowed to walk free because of incomplete or lost records. Regional magistrates deal with serious criminal cases and may even impose life imprisonment. Record-keeping should be prioritised.’

[17.4] The Constitutional Court held as follows in *S v Schoombee and Another* and I prefer to quote quite extensively:

‘It is long established in our criminal jurisprudence that an accused’s right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a key component of this right. When a record “is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside.

If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is “part and parcel of the fair trial process”. Courts have

identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the state in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to reconstruct a record in open court. Others have required the clerk of the court to reconstruct a record based on affidavits from parties and witnesses present at trial and then obtain a confirmatory affidavit from the accused. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judicial officer is often required.

The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. When a trial record is inadequate, both the State and the appellant have a duty to try and reconstruct the record. While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative carries the final responsibility to ensure that the appeal record is in order. At the same time, a reviewing court is obliged to ensure that an accused is guaranteed the right to a fair trial, including an adequate record on appeal, particularly where an irregularity is apparent. . . . The loss of trial court records is a widespread problem. It raises serious concerns about endemic violations of the right to appeal. Reconstruction should not be the norm in providing appellants with their trial records. But when reconstruction is necessary, the obligation lies not only on the appellant, but indeed primarily on the court to ensure that this process complies with the right to a fair trial. It is an obligation that must be undertaken scrupulously and meticulously in the interests of criminal accused as well as their victims.'

This warning by the full Constitutional Court — a unanimous decision by 10 judges — cannot be overemphasised and my observations herein are in line therewith. In that case the trial judge kept detailed notes of the proceedings, but when the record had to be reconstructed, he did not ask any inputs from the legal representatives of the parties. This left the door open for the appellant's legal representative to change tack when the Constitutional Court was approached by relying on an insufficiently transparent record insofar as the parties did not jointly undertake the reconstruction. The criticism was considered as is clear from the quotation, but the court found against the appellant. Significantly, no directives were forthcoming from the Constitutional Court as to how the problem of improper record-keeping should be addressed.

[17.5] In *S v Phakane* the Constitutional Court stated the following:

'The failure of the state to furnish an adequate record of the trial proceedings or a record that reflects Ms Manamela's full evidence before the trial court, in circumstances in which the missing evidence cannot be reconstructed, has the effect of rendering the applicant's right to a fair appeal nugatory or illusory. Even before the advent of our constitutional democracy, the law was that, in such a case, the conviction and sentence or the entire trial proceedings had to be set aside.'

Again, as in *Schoombee*, no directives were issued in an attempt to prevent the numerous problems experienced with missing or incomplete records. Froneman J agreed with the majority that the appeal ought to succeed but suggested in his minority judgment 'that the matter be remitted to the High Court for an investigation

into whether a retrial should proceed'. In my view a retrial in that case would probably be a waste of time insofar as the murder had been committed in 2006, 12 years earlier."

[14] It is also vital to underscore that, in *Nkhahle*, the learned Judge further observed that the position in most, if not all the Divisions of the High Court, regarding missing and incomplete records, was the same and he had the following to say:

"[16] It becomes more and more prevalent, from my own experience dealing with reviews and appeals in this division, but also reading judgments from other divisions, that courts of appeal are confronted with missing and/or incomplete records. Something needs to be done urgently. We are living in the digital era, the so-called fourth industrial revolution, but it is often forgotten that the human element can never be ignored. Machines and sophisticated equipment must be operated by people and if the operators do not possess the necessary skills, the best equipment in the world becomes useless. I shall make some suggestions infra."

[15] The learned Judge proceeded and made certain suggestions pertaining to record-keeping and custody of records, where he said at paragraphs [24] to [25]:

"[24] In years gone by magistrates did the recordings themselves by having tape recorders on their benches and inserting tapes to record the trial proceedings, properly identifying the various tapes and making sure that the tapes were safeguarded for future reference. I recall from experience that magistrates also kept their handwritten notes for some time in order to ensure that transcribed records could be amended or supplemented when the need arose and have reason to

believe that it is still the case in respect of most of them. It appears as if the regional magistrate wants to convey that somebody has stolen the particular notes of the case kept in her custody in her office. If this is accepted, it is a serious reflection on security and the matter should be investigated.

[25] Advocate Botha of the DPP's office in Bloemfontein informed the court from the bar that his office has a system in place in terms whereof the records and notes of all criminal cases dealt with by that office are systematically stored and preserved. Fact of the matter is that prosecutors are supposed to keep notes primarily in order to assist when the need arises as mentioned *supra*, but also to assist the presiding officer to reconstruct a record if so required. I am glad to hear from Mr Reyneke that the office of Legal Aid South Africa in Bloemfontein keeps records for five years and that their notes can be retrieved at any given time. This is obviously also the case at the Kroonstad office, although the initial search for the relevant file was unsuccessful."

[16] Considering the sentiments expressed in *Nkhahle* regarding the stenographer, the Regional Magistrate and the public prosecutor; and the authoritative judgment of the Constitutional Court in *Schoombie* regarding reconstruction of records, it is apposite to highlight some of the aspects which may have a bearing in addressing the problems encountered with lost and incomplete records.

[17] On the other hand section 4(1) of the Magistrates Court Act³, provides that a court is a court of record. For this reason alone, a presiding officer is required to keep notes of proceedings in his/her court. Put it differently, the primary responsibility of ensuring that there is a court record lies squarely on the magistrate.

[18] In conclusion, I can do no more than referring to the case *S v Mthembu*⁴ at paragraph [17] , where Ponnann JA and Petse AJA (writing for the Court) with due reference to two earlier SCA decisions, namely *S v Legoa*⁵ and *S v Ndlovu*⁶, stated that ‘a fair trial enquiry does not occur *in vacuo*, but . . . is first and foremost a fact-based enquiry’. The effect of an incomplete record on appeal, which applies equally to reviews, which impacts such fact-based enquiry, was aptly stated in *S v Chabedi*⁷, at paragraph 5:

“On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible . . .”

³ Magistrates Court Act 32 of 1944

⁴ *S v Mthembu*; [2011] ZASCA 179; 2012 (1) SACR 517 (SCA)

⁵ *S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA); [2002] 4 All SA 373 (SCA)

⁶ *S v Ndlovu* 2002 JDR 0502 (SCA); 2003 (1) SACR 331 (SCA); [2002] ZASCA 144; [2003] 1 All SA 66 (SCA)

⁷ *S v Chabedi* [2005] ZASCA 5; 2005 (1) SACR 415 (SCA); Also see: *S v Sebothe and Others* 2006 (2) SACR (T) para [8]

[19] The incomplete record in this matter with no transcription of the vital portion of the proceedings or proper reconstruction of the record, is inadequate for a proper consideration of this appeal. The injunction in *Chabedi* is accordingly triggered and the entire proceedings on sentence stand to be set aside.

[20] It is my view that the record is inadequate since there could be no proper appraisal of the evidence on sentencing that could be exercised. The proceedings cannot be said to be in accordance with justice and this court cannot exercise its judicial powers correctly. For this reason the Appellant is entitled to a result.

[21] Accordingly, the appeal succeeds and the following order shall issue:

1. The appeal against sentence is upheld and the sentence is hereby set aside
2. The matter is remitted to the court *a quo* for reconsideration and hearing on sentence.

H. ZILWA
JUDGE OF THE HIGH COURT (ACTING)

MAKAULA J

I agree

M. MAKULA
JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv MT Solani

Instructed by: Legal Aid South Africa, Makhanda

For Respondent: Adv T. Soga

Instructed by: National Director of Public Prosecutions, Makhanda

Date Heard: 13 November 2023

Date Delivered: 19 March 2024